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UNLAWFUL DETAINER: ACTION ALLOWED THOUGH MORTGAGE SECURITY.—The court, in *Toplitz v. Standard Oil Company*,¹ held that the lessor could bring an action of unlawful detainer against a tenant for the non-payment of rent and thus secure his eviction from the demised premises without first resorting to a chattel mortgage given by the tenant to secure the payment of rent, the action not coming within section 726 of the California Code of Civil Procedure which provides that "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage." The purpose of this section is to prevent a multiplicity of suits and to compel the holder of a debt secured by mortgage to exhaust his security before recourse to the general assets of the debtor.² This section is a limitation upon the rights which usually pertain to property, and the restriction should not be carried beyond the obvious import of the language used.³

The principal case seems to decide a point heretofore undecided in this state. In *Schehr v. Berkey*,⁴ the lessee gave a chattel mortgage to secure the payment of rent and damages. Later the lease was assigned by the lessee. It was held that the lessor did not lose the right to foreclose the mortgage by having resorted to an action of unlawful detainer against the assignee. The reason given for the decision was that the lessee was a surety for the assignee,⁵ and that the former was bound by privity of contract, the latter by privity of estate. An action of claim and delivery may be brought without first resorting to foreclosure of the mortgage on the property replevied. The reason given is that the statute⁶ gives a right to contract for possession and any other interpretation would nullify this statute and the intention of the parties.⁷ The cases above cited recognize that the two actions

¹ (Oct. 7, 1914), 19 Cal. App. Dec. 493.

² *Ould v. Stoddard* (1880), 54 Cal. 613.

³ *Merced Bank v. Casaccia* (1894), 103 Cal. 641, 37 Pac. 648. In the following cases it has been held that section 726 does not apply: Judgment and foreclosure on property in another state does not bar suit in this state, *Felton v. West* (1894), 102 Cal. 266, 36 Pac. 676; contra, where property is in state and note sued on in another state, *Ould v. Stoddard* (1880), 54 Cal. 613; does not refer to pledge, *Savings Bank v. Middlekauff* (1896), 113 Cal. 463, 45 Pac. 840; if note and mortgage securing same is assigned as collateral security it is not to secure principal debt and suit to foreclose same is for preservation of security and not for recovery of principal debt, *McArthur v. Magee*, (1896), 114 Cal. 126, 45 Pac. 1068.

⁴ (1913), 166 Cal. 157, 135 Pac. 41.

⁵ *Carver v. Steele* (1897), 116 Cal. 119, 47 Pac. 1007, 58 Am. Rep. 156, holding that a surety on a note may be sued although a right to recover on the mortgage is barred.

⁶ Cal. Civ. Code, § 2927.

⁷ *Harper v. Gordon* (1900), 128 Cal. 489, 61 Pac. 84; *Ely v. Williams* (1907), 6 Cal. App. 455, 92 Pac. 393. But see *Cederholm v. Loffborrow* (1886), 2 Idaho 176, 9 Pac. 641.

rest upon different rights, one, for the possession of property, the other, upon contract for the foreclosure of a mortgage.

Unlawful detainer is a summary proceeding for the possession of real property, in its nature a tort action. By taking the mortgage security it is not the intent of the lessor to waive the right to the summary remedy given by the code. If compelled to resort to the mortgage first, the lessor might be put to the necessity of retaining an undesirable tenant who would be piling up damages during the proceedings in excess of the security. Under these circumstances unlawful detainer is purely a possessory action and not an action for the recovery of a debt or right secured by mortgage. Any other interpretation would defeat the intention of the parties and derogate from the real purpose of the statute.

The code gives an award of damages and rent found due or three times the amount in the discretion of the court.⁸ The award is in the nature of damages for a tort, yet it includes the rent which is the debt secured by mortgage. The effect is, therefore, that the lessor recovers the rental indebtedness from the general assets of the lessee without being compelled to resort first to the mortgage security. Satisfaction of the judgment in unlawful detainer would certainly be an extinguishment of any claim for rent due. It might be contended that in such a case the judgment in unlawful detainer should be for possession and damages leaving the recovery of the rent to an action to foreclose the security. Where damages are also secured by the mortgage perhaps the amount of damage should be assessed in unlawful detainer, leaving the recovery to an action to foreclose the mortgage. Where, however, as in *Schehr v. Berkey*,⁹ the lease had been assigned, the court rendered a judgment including the rent against the assignee of the lease and then in another action foreclosed the mortgage against the lessee to satisfy the judgment.

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⁸ Cal. Code Civ. Proc., § 1174.

⁹ (1913), 166 Cal. 157, 135 Pac. 41.